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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1526

HENRY COULTER, ET AL.,
Petitioners,

vs.

ARCHIE MELADY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE SUPREME COURT, STATE OF TEXAS

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TO SAID HONORABLE COURT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Texas which denied relief sought on April 14, 1973.

OPINION BELOW

The order granting the defendant's motion for instructed verdict (S.F. p. 279) is set forth in a separate appendix. The opinion of the Court of Civil Appeals is reported in 489 S. W. 2d 156. It is set forth in a separate appendix, as well as the order denying rehearing, dated December 12, 1972, and the denial of Writ of Error by the State Supreme Court dated March 14, 1973.

JURISDICTION

The judgment of the Court of Civil Appeals, Sixth Supreme Judicial District was rendered on November 14,

1972, and rehearing denied on December 12, 1972. The jurisdiction of this Court is invoked under 28 U.S.C., §1257(3).

QUESTIONS RAISED

1. Is Art. 2.47 of the Texas Family Code in violation of the Fourteenth Amendment to the Constitution of the United States, Section One?

2. Did the Trial Judge violate the Seventh Amendment to the Constitution of the United States in denying the Petitioners a trial by jury, and citing Art. 2.47 of the Texas Family Code as his authority?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV:

> Section 1. "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Amendment VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Art. 2.47, Texas Family Code:

> Death of Party to Voidable Marriage. "A marriage voidable under this sub-chapter is not subject to chal-

lenge in any proceeding instituted after death of either party." Vernon's Texas Code Annotated Family Code, page 31.

STATEMENT

This is a suit by the brothers and sisters of the Deceased to set aside an attempted marriage contract in order that they may inherit under the laws of descent and distribution. Under Texas law, in the absence of a valid will the husband inherits all the personal property and one-half of the real property. The estate was valued at $200,000.00.

The Deceased had terminal cancer and was so diagnosed in July, 1970; afterward while this Deceased was in a toxic state the Respondent threatened, over-reached and persuaded the Deceased to appear before a Justice of the Peace on July 16, 1970, where Witness Moulder testified that the Deceased did not utter a word but stood mute before the Justice of the Peace, then sat with her head in her hands while the Justice of the Peace "read something from a book".

The doctors who treated the Deceased testified as to her condition two days before the purported marriage:

"Q. Tell the court and the jury how she came to your clinic? (S.F. 156, lines 8-14)

"A. They brought her in by ambulance on July 14th, and carried her back home by ambulance. I do not know how she came on that day, I was quite busy, and I just signed the forms that—and went on with the next patient.

"Q. I understand. Now then, did you make any recommendation to her as to what she should or should not do on this particular occasion?

"A. On the 14th, I begged her to let's go to the hospital where I could do more for her. She had had radiation a few weeks before that and was getting an extreme effect from the radiation, plus the fact that she was awfully toxic from her bowel situation, and needed to be in the hospital where she could have daily glucose and minerals and vitamins and keep her fluid level up.

* * *

"Q. Did it become necessary to increase the intake of sedatives as time wore along from February on until the time of her death?

"A. Right. (S.F. 158, lines 15-18)

"Q. Doctor, just let me give you this hypothetical situation: let's assume that you have a person in this condition that you have just described that Mrs. Melady or Mrs. Anderson was experiencing, I ask you whether or not in your opinion you felt like that she had the capacity to know the object of her bounty and the nature and the extent of what her acts might consist of?

"A. Only in part, I would say; simply because if you are tremendously disturbed emotionally, suffering pain (S.F. 159, lines 16-25) and so toxic that you feel the extreme effect of the toxemia—that's the absorption of the dead tissue where she had had radiation, the toxemia from the malignant tissue, all those things—why, it was wasting the body that you could see out here, and so I would say naturally the brain likewise, tissues of the brain were suffering the same situation. This total picture would impair your judgment as well as possibly to make you less alert as to what you were doing; just exactly borderline or how much, you cannot say for sure." (S.F. 160, lines 1-11)

Witness Mrs. Humphries testified:

"Q. Tell the court and jury what she said in that regard?

"A. Well, she said really she wasn't married to the man because she never said 'I do' and she did not take and hold hands with him, didn't join hands.

"Q. Did she say anything else about that?

"A. Well,—

"Q. I will ask you whether or not she expressed some concern over whether she was married or whether she wasn't married? I will ask that question.

"A. Said she really wasn't.

"Q. Did she try to explain to you why she went through this particular ceremony if she did?

"A. Yes, she went through it for fear of what would happen to her.

"Q. Did she express some fear as to what might happen to her if she didn't?

"A. Yes. He had threatened to burn the house down on her if she didn't. And that's why she went through all this procedure.

"Q. Did she say anything about whether or not he had made any other threats?

"A. Yes, she told me that.

"Q. Go ahead with what other threats, if there were any, that she said were made by Archie.

"A. Well, he threatened to—she said that he told her he would burn the house down and her in it, she wasn't able to get out; and she said that she was afraid of his jumping onto her and beating her up, in the condition she was in.

"Q. Was anything mentioned about Archie having any conversation with her about standing mute before the Justice of the Peace?

"A. Yes, he raised heck about it.

"Q. Said what?

"A. He raised heck about it. He talked ugly to her about it.

"Q. Did she use the word 'heck' or some other word?

"A. Well, another word, but I wouldn't say that." (S.F. 79-82, lines 24-9)

Witness Moulder testified:

"Q. Did Mrs. Melady answer any of the questions propounded to her by the Justice of the Peace?

"A. No, sir.

"Q. Did you ever hear her say 'I do'?

"A. No, sir.

"Q. Did you ever hear her say 'I accept this man to be my lawful wedded husband'?

"A. No sir.

"Q. Or any words to that effect?

"A. No, sir.

"Q. What was the next thing that transpired.

"A. I had to help her up, and we went back home.

"Q. What did you do when you got back home?

"A. I had to get some help to carry her in the house, she couldn't even walk.

"Q. Who helped you carry her in the house?

"A. My step son-in-law." (S.F. 48, lines 1-17)

Although a fact issue was present, the trial court instructed jury to return a direct verdict against the petitioners.

FEDERAL QUESTIONS FIRST RAISED IN TRIAL COURT

1. The Trial Court was interrogating Petitioner's counsel regarding the interpretation of Art. 2.47 of the Family Code, the following colloquy:

"MR. ANDERSON: That is correct, Judge. And I would like to make this one other observation, then I will sit down, if 2.47—you wouldn't have to look at that long because if that was the law, if that was permitted to be the law and if it was followed, there is no question in my mind that it is unconstitutional because if this was valid then you would be denying the parties due process of the law under the Fourteenth Amendment. You would be denying him of his property without a hearing in court, he never would have a day in court.

THE COURT: Be denying who?

MR. ANDERSON: A man of his property. The heirs of Leola Melady; you would be denying them of their property without due process of law, and they would not have been given their day in court.

THE COURT: Thank you, Mr. Anderson. Mr. Grant, I will hear your motion." (S.F. 178, lines 1-13)

2. Motion for New Trial, in Assignment of Error No. 10 (See Tr. 62)

3. Assignments of Error Three (Tr. 60); Five (Tr. 60); Nine (Tr. 62); Twelve (Tr. 63); Thirteen (Tr. 63) Same being Point No. 4 in Petitioner's Brief to Appellate Courts.

4. Assignments of Error Nos. Four (Tr. 60); Five (Tr. 60); Six (Tr. 60); Seven (Tr. 60); Nine (Tr. 62); Ten (Tr. 62); Eleven (Tr. 62); Twelve (Tr. 63); Fifteen (Tr. 64) Same being Point No. 8 in Petitioner's brief to Appellate Court.

The Trial Court, Court of Civil Appeals and Supreme Court violated the Seventh and Fourteenth Amendments of the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

1. Notwithstanding the Appeals Court holding, the above quoted testimony clearly shows that a fact issue was established as to whether a valid marriage was contracted, therefore the Petitioners have been denied their right to trial by jury in conflict with *R. B. Pittman* v. *Gulf, Colorado & Santa Fe Railway Company,* C. A. Eastland, 1960, Walter, J., 338 S.W. 2d 774 (n.r.e.), Cert. den. 82 S. Ct. 49, 368 U.S. 828, 7 L. Ed. 2d 31.

2. Section 2.47 is too vague, uncertain, unreasonable and capricious when considered in connection with the explanation made in the same rules as to what is meant by it, or the reason or purpose for such statute. *Connally* v. *General Construction Company,* 269 U.S. 385, 46 S. Ct. 126, 127, 70 L. Ed. 322.

3. The petitioners have been denied their day in court and a trial by jury and have therefore been denied their property without due process of law, and such ruling is in conflict with decisions rendered earlier in *Mullane* v. *Central Hanover Tr. Co.,* 94 L. Ed. at 875; *Armstrong* v. *Manso,* 14 L. Ed. 2d at 62, 66.

Although a jury was selected and heard the evidence and the fact issues involved, the trial court directed a verdict against the petitioners thereby denying the petitioners a meaningful opportunity to be heard at a meaningful time and manner by the jury which is in direct conflict with *Windsor* v. *McVeigh,* 23 L. Ed. 914 (1876) and this resulted in the taking of their property without due process.

ARGUMENT

In essence the Appellate Courts held that consent to the marriage was shown as a matter of law, disregarding the threats and force that were shown to exist. (S.F. 84, lines 8-9; 81, lines 19-25; 82, lines 1-22)

In substance the Appellate Courts are not looking behind the marriage license, and are saying that a boilermaker can obtain a brain surgeon's license through devious means and that he should be allowed to practice brain surgery because he has the proper license.

The Appellate Court skims over the unconstitutionality of Art. 2.47 of the Texas Family Code and simply say, "At the effective date of the Code Section the Appellants had nothing more than an expectancy under the law of descent and distribution. * * *" citing Dallas v. Trammel, 101 S.W. 2d 1009, which has to do with the City of Dallas and the State Legislature reducing the amount of the firemen's pension (police powers). Admitted this may be done, but the enactment of Art. 2.47 of the Family Code is even in violation of the Texas Constitution. See Vernon's Constitution of the State of Texas, Art. 3, §56 at page 749, which states:

> "Section 56: The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special laws authorizing:
>
> * * * Changing the law of descent and distribution."

The Appellate opinion unknowingly recognizes that Art. 2.47 of the Texas Family Code changed the laws of descent and very brilliantly states that the petitioners only had an expectancy at the time Art. 2.47 became effective. True, but at the moment of death they had a Constitutional vested interest by virtue of the Federal and State Constitutions.

The petitioners only had an expectancy during the life of the deceased regardless of the constitutionality of Art. 2.47.

If Art. 2.47 of the Family Code is permitted to remain in the Statutes, it is conceivable that a wife-beater and wife-terrorist could force a woman with $1,000,000.00 to marry him and after the Justice of the Peace "read something from a book" she might drop dead and he would be richer by $1,000,000.00 to the deprivation of her lawful heirs.

The trial court in his order granting the motion for instructed verdict (See appendix) recognizes the absurdity of Art. 2.47 and in substance says, a rascal may commit all the fraud, fear, and coercion he desires and the Fourteenth Amendment be damned.

For the foregoing reasons it is submitted that the Petition for Certiorari should be granted to review the judgment of the Court of Civil Appeals, Sixth Supreme Judicial District of the State of Texas, which decision was allowed to stand by the Texas Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was this the 24th day of April placed in the United States Mail, postage prepaid, to Mr. Ben Z. Grant, Post Office Box 299, Marshall, Texas, Attorney of Record for Respondents.

.....

Of Counsel